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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1960

No. 891

ROSALIE M. SCHUBERT,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONER IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner makes the following comments upon the brief filed in opposition to her petition for a writ of certiorari.

The opposition brief is based entirely upon the assumption "that the value of the assets that will remain at the end of the lease term exceeds the value of the property as subject to the lease" (O.B. 2) and concludes from this assumption that therefore no depreciation or amortization deductions are allowable during the term of the lease.

PETITIONER WILL SUSTAIN AN INEVITABLE LOSS THROUGH EXHAUSTION OF THE PROPERTY INVOLVED

In the first-place this completely ignores the gravamen of petitioner's case. She is the devisee of improved leased property of an admitted date of death value of $200,000. and her admitted basis for gain or loss and for depreciation is $200,000. It is in evidence and undisputed that the death value of the land had it been free of improvements and free of the lease was $154,000. It is a certainty that the lease will expire not later than January 31, 1973 and the useful life of the improvements under the best of circumstances not later than July 1, 1998. It is also a certainty that between August 31, 1953, the date of death of petitioner's mother, and July 1, 1998 at the latest, at least $46,000. of capital will disappear—the difference between the $200,000. death value and the $154,000. maximum of non-depreciable land value.

It is also a certainty that should the petitioner continue to own this property this loss will fall on her. Section 167 of the Internal Revenue Code provides that she should receive a "reasonable allowance" for this as a depreciation deduction.

The respondent's position is that petitioner has no exhausting interest in the physical improvements constructed by her mother's tenant and if this position is sustained she could never take depreciation on these improvements—nor, upon the same reasoning, could a purchaser or devisee from her—either during or after the lease. He also takes the position that if the assets at the end of the lease be of greater value than $200,000. she cannot amortize the value of a favorable leasehold.

Thus the inescapable result of respondent's arguments is that petitioner should bear the inevitable $46,000. loss from exhaustion of an asset despite the fact that the Internal Revenue Code grants her a reasonable allowance against income therefor.

THE EVIDENCE IS THAT PETITIONER'S INTEREST IN THE IMPROVEMENTS WILL BE LESS AT THE END OF THE LEASE THAN AT THE DATE OF DEATH

By an ingenious but rather startling mathematical process the respondent has now arrived at the conclusion that the value of the building upon the premises at the expiration of the lease on January 31, 1973, is $84,644.— no more, no less!

To do this he takes the 1953 real estate assessment, computes the percentages allocated to land and buildings respectively, applies these percentages to the $154,000. stated to be the death value of the land free of building and lease, comes up with a $149,305. death value for the building and depreciates this straight line for the remaining lease term.

This, of course, ignores the fact that no one has conceived that this 19 feet parcel with a five-story and basement building thereon would have a *fair market value* of $303,305. or anything approaching that sum, with or without a lease.

The fact is that the only evidence in the record as to the value remaining in the improvements at the expiration of the lease on January 31, 1973, is that it would be $7,200.

See appendix to petitioner's brief in the court of appeals, page 41.

The record not only does not establish "that the value of the assets that will remain at the end of the lease term exceeds the value of the property as subject to the lease," it establishes that they will be at least $38,685. less in value.

Petitioner submits that if this case is to turn on the factual question of the salvage value of assets remaining on January 31, 1973, and the record evidence is not considered sufficient to establish this at $7,200., then it should be remanded to the Tax Court for a specific finding.

Respectfully submitted,

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